STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

LEAGUE OF WOMEN VOTERS OF MICHIGAN, AMERICAN CITIZENS FOR JUSTICE, APIA VOTE - MICHIGAN, DETROIT ACTION, LGBT DETROIT, NORTH FLINT NEIGHBORHOOD ACTION COUNCIL, RISING VOICES, KENT BLOHM, CATHY BROCKINGTON, DENISE HARTSOUGH, DONNA HORNBERGER, GILDA JACOBS, JUDY KARANDJEFF, MARGARET LEARY, ATHENA MCKAY, CHRISTINE PAWLAK, KATHERINE PRIMEAU, RONALD PRIMEAU, SUSAN ROBERTSON, SUE SMITH,

S. Ct. No. _____

Plaintiffs,

v.

INDEPENDENT CITIZENS REDISTRICTING COMMISSION,

Defendant.

PLAINTIFFS' BRIEF IN SUPPORT OF COMPLAINT

ORAL ARGUMENT REQUESTED

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For

Theodore Sachs
1928 – 2001

Union Lawyer Extraordinaire,
Mentor, Friend, and the Lawyer
Who Brought One-Person, One-
Vote to Michigan

STATEMENT OF BASIS OF JURISDICTION

This Court has jurisdiction under Mich Const 1963, art 4, § 6(19) and art 6, § 4 over this Complaint about the Independent Citizens Redistricting Commission's ("ICRC") December 28, 2021 adoption of a districting plan for the State House of Representatives (found at https://michigan.mydistricting.com/legdistricting/comments/plan/280/23) (hereinafter "Adopted Plan").

STATEMENT OF QUESTIONS INVOLVED

1. Does the State House districting plan adopted by the ICRC violate Mich Const 1963, art 4, § 6(13)(d) because it "provide[s] a disproportionate advantage" to the Republican Party?

Plaintiffs say, "Yes."

ICRC says, "No."

2. Does the State House districting plan adopted by the ICRC fail strict scrutiny by diluting Democratic votes in violation of the fundamental right to vote, the constitutional right of political association, and the constitutional right to purity of elections?

Plaintiffs say, "Yes."

ICRC says, "No."

3. As a remedy should the Court vacate the plan and remand to the ICRC to promptly correct the plan?

Plaintiffs say, "Yes."

ICRC says, "No."

INTRODUCTION

Julianne Pastula, ICRC General Counsel: " … [Z]ero [Efficiency Gap] is your goal."[1]

Dr. Lisa Handley, partisan fairness analyst: "[Zero Efficiency Gap] is possible."[2]

When the ICRC quit trying to improve the partisan fairness of its maps on December 28, 2021 after a year of bungling and stumbling on that issue, it fell well short of what its partisan fairness analyst, Dr. Lisa Handley, said was possible and what its lawyer, Julianne Pastula, said was the goal: a 0% Efficiency Gap, meaning a State House plan exhibiting no partisan bias.

Instead based on its own analysis its Adopted Plan has an Efficiency Gap – a widely accepted measure of partisan fairness in a redistricting plan – of at least **4.3% in favor of Republicans**. In this highly competitive two-party state in which legislative elections can be decided by a few hundred votes and control of a legislative body may turn on 1 or 2 seats, the Adopted Plan biases State House elections toward the Republicans for the next decade.

That the Adopted Plan falls short on partisan fairness is also proven by Promote the Vote's ("PTV") State House plan, which has *less than one-third* the Efficiency Gap of the Adopted Plan and better scores on the other measures of partisan fairness than the Adopted Plan, while complying as well or better with all of the other constitutional criteria. PTV's plan demonstrates that the ICRC's Adopted Plan could have been much better on partisan fairness had the ICRC not given up.

The Court should vacate the Adopted Plan, remand to the ICRC to promptly improve the

[1] October 1, 2021 ICRC Meeting Video at 2:22:17. The efficiency gap measures the degree to which a party "wastes" votes, i.e., receives votes which do not result in winning a district. Wasted votes consist of all the votes won by the losing party in a district, and all of the votes over 50% + 1 received by the winning party. Where one party wastes far more votes than another, it indicates partisan bias against that party.

[2] *Id.* at 2:22:46, 2:22:54.

partisan fairness of its State House plan to at least match the PTV plan, and give the ICRC the option to adopt the PTV plan.

STATEMENT OF FACTS

A. *Historic Levels of Partisan Gerrymandering in Michigan, 2012–2020*

Following their successful 2001 gerrymander, in 2011 the Republican Legislature's gerrymander of Michigan's Congressional, State Senate, and State House districts was of historic proportions, not just in Michigan but compared to all redistricting plans adopted in every state since 1970.

The scheme was described in the factual findings of the federal court in Michigan's 2019 partisan gerrymandering decision:

> As the release of the 2010 census data approached, the Republican State Leadership Committee ("RSLC") engaged in a national effort to ensure that states redrew their congressional lines during the 2011 redistricting cycle to favor Republican candidates and disadvantage Democrats. The RSLC appropriately named their initiative the "REDistricting MAjority Project," or "Project REDMAP." According to a 2013 report from the RSLC, they raised $30 million towards Project REDMAP from 2009 to 2010. The goal of Project REDMAP was simple: "[d]rawing new district lines in states with the most redistricting activity . . . to solidify conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade." The report explained that drawing district lines favorable to Republicans was at the core of this strategy. According to the report, "all components of a successful congressional race . . . rest in the congressional district lines, and this was an area where Republicans had an unquestioned advantage [in the 2012 elections]."

League of Women Voters of Mich v Benson, 373 F Supp 3d 867, 882 (ED Mich, 2019) (3-judge panel), *judgment vacated sub nom Chatfield v League of Women Voters of Mich*, ___ US ___; 140 S Ct 429; 205 L Ed 2d 250 (2019) (*mem*) (citations omitted).

The REDMAP effort worked well nationally and especially in Michigan:

> Project REDMAP proved wildly successful both nationally and in Michigan. As the RSLC said in its 2013 report, in the 113th Congress,

> elected in November 2012 during the first elections after the 2011 redistricting cycle, "Republicans enjoy[ed] a 33-seat margin" nationally despite the fact that "voters pulled the lever for Republicans only 49 percent of the time in congressional races, suggesting that 2012 could have been a repeat of 2008" when Democrats won the United States House of Representatives. *Further, the report found that "[t]he effectiveness of REDMAP is perhaps most clear in the state of Michigan." The REDMAP report explained that while "[t]he 2012 election was a huge success for Democrats at the statewide level in Michigan[,]" with voters "elect[ing] a Democratic U.S. Senator by more than 20 points and reelect[ing] President Obama by almost 10 points . . . Republicans at the state level maintained majorities in both chambers of the legislature and voters elected a 9–5 Republican majority to represent them in Congress."*
>
> Republicans enjoyed great success in Michigan's 2012 elections due in large part to the efforts of Republican legislators and map-drawers in the redistricting process in 2011. The passage of the Enacted Plan represented the culmination of a calculated initiative by Michigan's Republican legislators and map-makers, in the 2011 redistricting cycle, to deliberately draw Michigan's legislative districts to maximize Republican advantage and, consequently, disadvantage Democratic voters, Democratic candidates, and the Democratic Party. The partisan advantage that Michigan lawmakers achieved through the Enacted Plan persists to this day.

Id. at 883 (emphasis added) (citations omitted).

The electoral consequences of that partisan gerrymander endured for a decade:

> [The gerrymandered plans] proved tremendously successful in advantaging Republicans and disadvantaging Democrats throughout several election cycles. In each of the three statewide elections held under the Enacted Plan between 2012 and 2016, Republicans won 64% of Michigan's congressional seats (*i.e.*, 9 of 14) even though they never earned more than 50.5% of the statewide vote. . . . In Michigan's 2014 Senate election, Republicans earned only 50.4% of the vote but won 71.1% of the seats.
>
> The partisan bias in Michigan's legislative maps continued in the 2018 midterm elections. Democrats earned approximately 55.8% of the vote in congressional elections but gained only 50% of the congressional seats; 52.6% of the vote in the House but only 47% of the House seats, and over 50% of the vote in the Senate but only 42% of the Senate seats. In other words, despite earning a sizable majority of aggregate votes for congressional candidates, Democrats merely pulled even with

> Republicans in terms of seats won. And despite earning a majority of the votes cast in the House and Senate elections, Democrats remained decidedly in the minority in both chambers of the state legislature.

Id. at 892–93 (citations omitted).

The Court's determination of partisan gerrymandering on a massive scale flowed from all the evidence:

> We have found that 27 of the 34 Challenged Districts violate Plaintiffs' First and Fourteenth Amendment rights by diluting the weight of their votes. We have also found that [all 34] Challenged District[s] violate Plaintiffs' First Amendment right to association.

Id. at 960.

Beyond these federal court findings, the national and Michigan gerrymandering efforts of REDMAP have been well-documented. See, e.g., Daley, *Ratf**ked: Why Your Vote Doesn't Count* (New York: Liveright, 2016), ch 5, pp 61–82; Strand, *Among the Gerrymandered: How Redistricting in Michigan Has Disenfranchised Voters and Amplified the Efforts of the Right*, Pacific Standard (February 22, 2019).

By the latter part of the decade a grassroots revolt was underway against this egregious partisan overreach.

B. *The 2017–18 Grassroots Revolt Against Partisan Gerrymandering: Voters Not Politicians and Proposal 2*

In reaction to this abusive gerrymandering, the sole purpose of 2018 Proposal 2, which became Mich Const 1963, art 4, § 6, was to end partisan gerrymandering. From founder and President Katie Fahey's first Facebook message—"I'd like to take on gerrymandering in Michigan, if you're interested in doing this as well, please let me know"—to its name—"Voters Not Politicians" ("VNP")—to its campaign message—"politicians should not be choosing voters, voters should choose politicians"—the *only goal* was to end partisan gerrymandering. See, e.g.,

Perkins, *Grassroots Group Is Working To Put Gerrymandering Issue on Michigan's 2018 Ballot,* Detroit Metro Times (March 7, 2017); Allen, *'Voters Not Politicians': Anti-Gerrymandering Group Finds Support in Holland, Across Michigan*, Holland Sentinel (December 7, 2017); Tomlin, *A Line in the Sand: How Voters Not Politicians Aims To End Gerrymandering in Michigan*, Rapid Growth Media (February 22, 2018); Fahey, *My Fight To End Gerrymandering*, New York Times (January 23, 2018); Trickey, *A Grassroots Call To Ban Gerrymandering*, The Atlantic (September 23, 2018); Begin, *Michigan Redistricting Ballot Language Repeats Partisan Phrasings*, Bridge Michigan (August 30, 2018) (reporting that VNP told the Board of Canvassers that "the purpose of the initiative . . . is to prevent partisan gerrymandering"). As Fahey repeatedly described the proposal, "We directly make gerrymandering illegal." *Grassroots Call, supra*.

There can be no doubt that purpose of the proposal was to end gerrymandering and the voters overwhelmingly endorsed that purpose. Proposal 2 passed 61.1% to 38.9% in November 2018. Egan, *Michigan Voters Approve Anti-Gerrymandering Proposal 2*, Detroit Free Press (November 6, 2018).

Proposal 2 sought to end gerrymandering using both procedural and substantive reforms. It changed the procedure to a transparent bipartisan commission leavened with non-affiliated members. Substantively, it directed the ICRC to adopt plans that do "not provide a disproportionate advantage to any political party . . . determined using accepted measures of partisan fairness:"

> Districts shall not provide a disproportionate advantage to any political party. A disproportionate advantage to a political party shall be determined using accepted measures of partisan fairness.

Mich Const 1963, art 4, § 6(13)(d).

The ICRC bungled fulfilling Proposal 2's sole purpose—plans which achieved partisan fairness. We turn now to a description of how it failed.

C. *The ICRC Bungles the Handling of Partisan Fairness*

> "Some time should be spent at some point determining how you want to go about looking at political fairness. I think this needs to be explored. … I don't specialize in this. … ."
>
> -ICRC political fairness analyst Dr. Lisa Handley, June 28, 2021 Redistricting Process Committee Meeting Video, 1:03:38

> "I chose the [measures of partisan fairness] that were the easiest to put into an Excel [spread]sheet and the easiest to explain."
>
> -Handley again, October 1, 2021 Meeting Video, 2:13:09

Despite the clear mandate of Proposal 2 to create fair plans, the ICRC did not address that obligation until very late in its map-drawing process, scrambling to fix the unfair draft plans it had already drawn when it learned how unfair they were. It failed to fix them, leaving its State House plan unfair with significant and durable partisan bias.

The ICRC's chronology reveals its mishandling of the sole goal of Proposal 2, partisan fairness.

Five months after the ICRC convened it first received a short "partial overview" of the redistricting criteria from its newly-hired General Counsel, Julianne Pastula ("Pastula"). See February 18, 2021 Minutes at 5.[3] Further discussion of the criteria was repeatedly pushed back, see, e.g., March 11, 2021 Minutes at 4, until Pastula finished it in a brief presentation on March 18. See March 18, 2021 Minutes at 4. At that same meeting the ICRC authorized the hiring of a racially polarized voting analyst for Voting Rights Act ("VRA") purposes, Dr. Lisa Handley

[3] It had previously received some general briefings from academics. See, e.g., December 4, 2020 Minutes at 2; December 3, 2020 Minutes at 2.

("Handley"), but hired no one to assist it on partisan fairness. See *id.*

Nine months after the ICRC convened, at its June 10, 2021 meeting, the ICRC authorized a Redistricting Process Committee ("RPC") to make recommendations to the ICRC on the procedures to use to draw maps. See June 10, 2021 Meeting Minutes at 6–7. At a June 28, 2021 RPC meeting to which Handley was invited to discuss VRA matters, out of curiosity she asked the members of the RPC what the ICRC was doing regarding partisan fairness. Based on that casual question, she was asked to make a partisan fairness presentation even though she told the RPC that "I don't specialize in this" and recommended that a political scientist be found to do it. See June 28, 2021 Minutes of the RPC at 3; June 28, 2021 RPC Meeting Video, 1:03:38; June 28, 2021 Transcript at 17–22.

At its June 30, 2021 meeting—more than nine months after it had convened and on the cusp of map-drawing—the ICRC authorized a one-hour presentation by Handley on partisan fairness. See June 30, 2021 Minutes at 5. This was done despite the facts that Handley had never been vetted by the ICRC for that work, had been hired based *solely* on her VRA expertise, and had specifically disclaimed expertise on partisan fairness. Apparently, her merely asking a question at the RPC meeting was enough to prompt this presentation.

Handley's presentation on partisan fairness occurred at the July 9 meeting to only 10 of the 13 commissioners. See July 9, 2021 Minutes at 4; Meeting Video beginning at 2:38:30. She began the presentation by asking commissioners if "they had a way forward" to measure partisan fairness, and Commissioner Szetela conceded that the ICRC did not. Meeting Video at 2:40:51. Handley then discussed only three of the measures of partisan fairness, acknowledging that she only described a small set of available measures—those that are simple to understand and easy to calculate using a spreadsheet. See July 9, 2021 Minutes, Handley PowerPoint at 16; e.g., Meeting

Video at 2:43:06. The ICRC was *never* advised by Handley nor by anyone else of the other measures of partisan fairness nor given the opportunity to consider them. Moreover, the ICRC didn't vote to adopt any measures of partisan fairness.

On August 6, the ICRC again heard the same Handley presentation on partisan fairness. See August 6, 2021 Minutes at 3. This time her PowerPoint was supplemented by a memo which once again justified the use of only those three measures by alleged ease of calculation and incorporation into redistricting software. See *id.*; see also Handley, "Some Mathematical Measures for Determining if a Redistricting Plan Disproportionately Advantages a Political Party."

As at the July 9 meeting, Handley never advised the ICRC on August 6 of the other measures of partisan fairness nor analyzed them. The ICRC took no action at its August 6 meeting to adopt any—let alone Handley's—measures of partisan fairness for use in drafting maps. The drifting on partisan fairness continued.[4]

Lacking knowledge of the full range of partisan fairness measures available to them and without having approved the use of *any* partisan fairness measures at all (or obtained any VRA

[4] A political scientist or other expert with the requisite experience and expertise in measuring partisan fairness would have presented information to the ICRC on *all* the commonly-accepted methods of measurement of this critical, objective factor. An experienced expert would have described the pros and cons of the available methods in light of various factors particular to Michigan's history and voting patterns, and then made recommendations to the ICRC about the combination of measurements which would best inform the partisan fairness of the map-drawing as it proceeded. In addition, an experienced expert in partisan fairness would have made recommendations to the ICRC about what data would most accurately reflect the political makeup of Michigan, i.e., which election results to use, and whether to weight them equally or to weight more recent results more heavily.

Armed with these informed recommendations, the ICRC should have then voted on a particular path of using a specific combination of methods of measurement and utilizing particular election results in a proscribed way – so the public would know what decisions were made and why. Then, an experienced expert would have made these measurements available to the ICRC and its map-drawers ***during the map-drawing process***, instead of forcing the ICRC to attempt last-minute fixes to entire maps already drawn where other, subjective criteria had already been considered and incorporated.

But the ICRC did none of this, a colossal procedural failure which led directly to its biased maps.

analysis), the ICRC nevertheless plunged into drawing draft Senate, House, and Congressional maps on August 20. See August 20, 2021 Minutes; Meeting Video beginning at 5:19:00. It drafted maps over dozens of meetings during the next six weeks.[5]

At virtually every meeting the public objected to the ICRC drawing draft maps blindly without considering partisan fairness, expressing concerns that it would lead to unfair maps. See, e.g., August 26, 2021 Afternoon Meeting Video (comments of Chris Andrews); August 30, 2021 Meeting Video; August 31, 2021 Meeting Video (three comments urging partisan fairness); September 2, 2021 Meeting Video (several comments urging partisan fairness); September 8, 2021 Meetings Video (partisan fairness sought); September 9, 2021 Afternoon Meeting Video (same); September 13, 2021 Meeting Video (same); September 14, 2021 Meeting Video (same); September 20, 2021 Meeting Video (same); September 21, 2021 Meeting Video (same); September 23, 2021 Morning Meeting Video (same); September 28, 2021 Meeting Video (same); September 29, 2021 Meeting Video (same—at least a dozen comments); September 30, 2021 Meeting Video (same—several comments). As one public commenter, Chris Andrews, put it:

> … To have fair maps, you need to be considering the partisan makeup of the districts, both individually and the maps as a whole. I haven't seen that, and I hope it, I think it has to become part of the process. Voters amended the Constitution because we were harmed by gerrymandered districts that were written by politicians for partisan advantage. It was an intended consequence. I would hate to see an unintended consequence of maps that collectively or individually aren't competitive and don't reflect the makeup of the state as a whole. …

[5] While the ICRC proceeded to draft maps without partisan fairness guidance, Handley was officially hired to perform partisan fairness analysis. See September 20, 2011 Minutes at 6–7. However, this was done as a verbal addendum to the existing contract for her VRA services. No Request for Proposal was approved or issued, no competitive bids were received, and no vetting of Handley's credentials, or lack thereof, occurred. See *id.* The verbally described addendum isn't part of that meeting's records, see *id.*, and didn't show up in the ICRC's public records until a later meeting, see Minutes of September 23, 2021, Appendix C to EDS contract.

This improper procedure is another example of the ICRC's inattentiveness to partisan fairness and rushing to fix it, further compounding its mishandling of this critical issue from the beginning.

8/26/21 Afternoon Meeting Video at 28:25. Mr. Andrews again commented at a later meeting: "It's hard to comment when you don't have the political context to assess fairness. … Somebody might say, don't break up Lansing, or don't break up Ingham County. But they might not say that if they knew that was the path to two competitive Senate districts. I commend Commissioner Eid for coming up with a plan to draw two Lansing region Senate seats. I've seen some people call this a gerrymander. It's the opposite. It intentionally creates fair and competitive districts. …" 9/9/21 Afternoon Meeting Video at 28:22.

Similarly, several commissioners expressed concern about the failure to consider partisan fairness as draft maps were drawn. See, e.g., August 30, 2021 Meeting Video (comments of Commissioners Eid and Witjes); September 8, 2021 Meeting Video (comments of Commissioner Wagner); September 15, 2021 Meeting Video (Commissioner Rothhorn); September 29, 2021 Meeting Video (Commissioner Rothhorn says lack of partisan fairness data hinders ability to adjust maps).

Pastula repeatedly resisted allowing the ICRC to consider partisan fairness while drawing draft maps. See, e.g., August 30, 2021 Meeting Video; September 8, 2021 Meeting Video; September 30, 2021 Meeting Video.

Faced with a lack of data and Pastula's opposition, some commissioners resorted to using national evaluation tools such as PlanScore, a nonpartisan national website for analyzing redistricting plans, to assess the partisan fairness of the draft maps. See September 20, 2021 Meeting Video beginning at 1:20:43; beginning at Transcript at 26-27 (Commissioner Eid assesses partisan fairness with PlanScore).

The ICRC completed its first draft Senate map on September 15, 2021 without any consideration of partisan fairness. See generally September 15, 2021 Meeting Video. On September 16, 2021, some partisan data became available to the ICRC, see Meeting Video, but it was not used in any systematic way to prevent the drafting of unfair maps.

The public and a handful of commissioners were right – and Pastula was catastrophically wrong – in the approach to partisan fairness in drafting maps.

When the ICRC was finally briefed on October 1 about the partisan fairness of their six weeks' worth of maps, Handley told them that their legislative maps were badly flawed. *Every* measure of partisan fairness significantly favored the Republicans. See October 1, 2021 Meeting Video.

In the first draft reviewed Senate map, the Lopsided Margin test favored Republicans by 6.9%,[6] demonstrating that Democratic voters were packed. The Efficiency Gap favored Republicans by 8.4%. The Mean-Median[7] advantaged the Republican Party by 3.6%. Finally, the Seats/Votes calculation[8] favored Republicans by 4.9%. See October 1, 2021 Meeting Video beginning at 1:46.

Based on these Senate analyses, Pastula changed her tune and told the ICRC that the partisan fairness measures were too high and had to be reduced. See October 1, 2021 Video at

[6] This metric measures partisan bias by comparing margins of victory.

[7] The mean-median gap measures the difference between a party's vote share in the median district and its average vote share across all districts. Comparing a dataset's mean and median is common statistical analysis used by political scientists to assess skews in the data and detect asymmetries. In the context of redistricting, if a party wins more votes in the median district than in the average district, it has a disproportionate advantage in its translation of vote to seats.

[8] This metric seeks to measure whether two opposing parties are equally likely to command the same number of seats given a certain share of votes. Thus, if one party has a disproportionate number of seats given its vote share, in an unbiased districting plan the opposing party would have the same disproportionate advantage if it were to have that same vote share. For example, if one party receives a vote share of 57% and a seat share of 64%, then in an unbiased districting plan the opposing party would also win 64% of the seats if it were to attain 57% of the votes.

2:20:28. Pastula told the ICRC that a 0% Efficiency Gap was its goal. See *id.* at 2:22:17. Handley agreed that a 0% Efficiency Gap was possible. See *id.* at 2:22:46, 2:22:54.

The partisan fairness analysis of draft House plans showed even more partisan bias in favor of Republicans than draft Senate plans. The first draft House plan examined had a 9.2% Lopsided Margin, Mean-Median of 4.8%, 11.8% Efficiency Gap, and Seats/Votes of 7.8%, all favoring the Republicans. See October 1, 2021 Meeting Video at 4:44:00.

And so the ICRC began a belated, hasty effort—a year after it first convened—to correct its unfair draft legislative plans in time to meet its self-imposed deadline of issuing proposed plans by November 12, 2021 for the 45-day public comment period. After all of these unforced errors in its year-long mishandled partisan fairness process, it had barely five weeks to do that and make all the other adjustments to the draft plans required to be in compliance with, *inter alia*, the VRA. While the ICRC put the partisan fairness measures Handley used into its software, the ICRC once again *never voted* to adopt the partisan fairness measures Handley used or any others.[9]

The public demand for fair maps continued. See, e.g., October 5, 2021 Meeting Video; October 6, 2021 Meeting Video; October 7, 2021 Meeting Video; October 8, 2021 Meeting Video; October 11, 2021 Meeting Video; October 20, 2021 Meeting Video; October 21, 2021 Meeting Video; October 22, 2021 Meeting Video; October 25, 2021 Meeting Video; October 26, 2021 Meeting Video; October 28, 2021 Meeting Video; October 29, 2021 Meeting Video; November 1, 2021 Meeting Video.

[9] The ICRC's minutes indicate that it never officially adopted *any* redistricting criteria, whether as to partisan fairness or any other, for its own guidance or for public transparency about what it was doing. It *ad hoc'*ed its way through the entire map-drawing process. Commissions in other states chose a better, more transparent path by formally adopting policies on redistricting criteria *in advance* to guide their work. See, e.g., Colorado Independent Redistricting Commissions, *Commission Policies and Guidelines*, <https://redistricting.colorado.gov/content/policies-and-guidelines> (accessed January 23, 2022).

At the October 5 meeting, Handley made a final 10-minute presentation on "Possible Unacceptable Scores" of partisan fairness. See October 5, 2021 Meeting Minutes, Handley Handout. It was based on her "quickly" going "through the court cases and literature" but she said it was a "little spotty" because she lacked access to the expert reports in the four cases she discussed. October 5, 2021 Meeting Transcript at 115. This provided no value whatsoever to the ICRC as it sought to *lower* the partisan fairness measures. Commissioner Eid correctly pointed out that the "disproportionate advantage" language of the Michigan Constitution was not at issue in any of these cases. See *id.* at 118-19.

The ICRC's rushed effort to correct the partisan fairness of its draft maps fell well short. So it was no surprise on December 28 when the ICRC met to approve final maps that several commissioners sought more time to fix the still-biased House map. See, e.g., December 28, 2021 Meeting Transcript at 30-31 (Commissioner Lange); 32-33 (Commissioner Kellom); 31, 33-34 (Commissioner Wagner); 35-36 (Commissioner Szetela). Those requests fell on deaf ears.[10]

The ICRC adopted the so-called Hickory plan for the State House on December 28. By Handley's analysis it *still* has a 5.3% Lopsided Margin, a 2.7% Mean-Median, a 4.3% Efficiency Gap, and a Vote/Seat share .5%, all in favor of Republicans. See Compliance Analysis, at https://www.michigan.gov/documents/micrc/MICRC_Compliance_Analysis_Tracking_741251_7.xlsx.

The ICRC failed to meet the stated goal of *its own lawyer*, a 0% Efficiency Gap. It simply

[10] Staff with the Secretary of State also unnecessarily pushed Commissioners to select maps in December without considering the need for any further corrections to the maps by stating that the Bureau of Elections could not complete its work adjusting databases to the new boundaries in time for scheduled primaries. December 28, 2021 Meeting Transcript at 34-35. However, even in the pre-computerized era, the Bureau of Elections has historically completed this work much more quickly than in the four months that SOS Staff urged BOE be given. See, e.g., *In re Apportionment of State Legislature – 1982,* 413 Mich 96, 212-14; 321 NW2d 565 (1982) (*per curiam)* (legislative plans adopted by the Court on May 21; primary held on time). Moreover, the Legislature, this Court, or even the Attorney General can and have adjusted filing requirements during redistricting when necessary. See, e.g., *id.;* OAG No. 6081 (1982). Bureaucratic interests should not be allowed to supersede the constitutional right of Michigan citizens to fair districts.

gave up, condemning the voters of Michigan to another 10 years under a partisan biased, unfair State House map unless this Court intervenes to protect those voters.

D. *Promote The Vote Filed A State House Plan With The ICRC Which Better Complies With All the Criteria, Including Partisan Fairness.*

On October 7-8, 2021 Promote the Vote, a nonpartisan statewide coalition of organizations and individuals committed to protecting democracy including fair redistricting, see http://www.promotethevotemi.com, filed 3 complete redistricting plans with the ICRC, one for each body it was charged with redistricting Those plans included detailed narratives describing the districts and the communities of interest they advanced. See https://www.michigan-mapping.org/submission/o6250 ("PTV Plans").

The PTV Plans complied with all of the redistricting criteria of Article 4, § 6(13): contiguity, within the allowable constitutional population ranges, compliant with the Voting Rights Act, reflecting communities of interest, consideration of county boundaries, compactness, and with partisan fairness measures superior to those of the adopted plans. See *id.* Those plans including particularly here the PTV State House Plan demonstrate that the criteria of § 6(13) can *all* be satisfied by a plan which has much better partisan fairness than the Adopted Plan. There is no conflict among the criteria of § 6(13) – they can all be satisfied and could have been but for the bungling of the ICRC, bungling this Court can correct.

ARGUMENT

THE ICRC'S ADOPTED STATE HOUSE PLAN VIOLATES THE FUNDAMENTAL RIGHTS TO VOTE AND OF ASSOCIATION BY DILUTING DEMOCRATIC VOTES AND VIOLATES ARTICLE 4, § 6(13)(d) BY "PROVID[ING] A DISPROPORTIONATE ADVANTAGE" TO THE REPUBLICAN PARTY.

I. THE RULES OF CONSTITUTIONAL INTERPRETATION.

This Court has established several rules governing state constitutional analysis.

The text is the touchstone. In examining the text, the paramount rule of constitutional interpretation "is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." *People v Tanner*, 496 Mich 199, 223; 853 NW2d 653 (2014) (quoting *Wayne Co v Hathcock*, 471 Mich 445, 468; 684 NW2d 765 (2004)). When applying this principle of constitutional interpretation, "the people are understood to have accepted the words employed in a constitutional provision in the sense most obvious to the common understanding and to have 'ratified the instrument in the belief that that was the sense designed to be conveyed.'" *Tanner*, 496 Mich at 224 (quoting *People v Nutt*, 469 Mich 565, 573-74; 677 NW2d 1 (2004)). As often cited, Justice Cooley described this rule:

> A constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it*. "For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, *the intent to be arrived at is that of the people*, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding*, and ratified the instrument in the belief that that was the sense designed to be conveyed."

Federated Publications, Inc v Bd of Trustees of Mich State Univ, 460 Mich 75, 85; 594 NW2d 491 (1999) (quoting 1 Cooley, Constitutional Limitations (6th ed), p 81). The common understanding of a legal term of art used in the constitution is its technical meaning. *Mich Dep't of Transp v Tomkins*, 481 Mich 184, 209-10; 749 NW2d 716 (2008). This Court has relied heavily on the constitutional text of the 2018 Proposal 2 in interpreting it. See, e.g., *Detroit News, Inc v Indep Citizens Redistricting Comm*, ___ Mich ___; ___ NW2d ___; No 163823, 2021 WL 6058031, at *5 (December 20, 2021).

As part of this textual analysis, and of particular importance here, every constitutional provision "must be interpreted in the light of the document as a whole, and no provision should be

construed to nullify or impair another." *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003) (citing *In re Probert*, 411 Mich 210, 232-33 n 17; 308 NW2d 773 (1981)).

In addition to the text, the history of a constitutional provision, the circumstances of its adoption, and its purpose all may be used to ascertain the common understanding of the voters who adopted it. See, e.g., *Citizens Protecting Mich's Constitution v Secretary of State*, 503 Mich 42, 60, 62, 75-82, 100-03 & nn 26, 33, 73, 76, 78, 86, 98, 101, 177, 187, 192; 921 NW2d 247 (2018) (consulting treatises, records of the 1907–08 and 1961–62 Constitutional Conventions, constitutional amendments, and history books).

II. STANDARD OF REVIEW

The Court Rules require this part of Plaintiffs' brief to be titled "Standard of Review." See MCR 7.306(C)(2) (incorporating 7.212(C)(7)). However, it should more appropriately be labeled "Role of the Court."

By operation of Article 4, § 6(19) of the Michigan Constitution and MCR 7.306, this is a *sui generis* original proceeding. In these unique redistricting cases, the Court is not functioning as an appellate court with a standard of review. Instead, in 1982 this Court unanimously held that in the legislative districting context it had a broader role and more detailed duty:

> It is this Court's duty under Const 1963, art 6, § 1, providing for the exercise of the judicial power, *to determine what are the requirements of this constitution and to define the meaning of those requirements in specific applications.*

In re Apportionment of State Legislature – 1982, 413 Mich 96, 114; 321 NW2d 2d 565 (1982) (*per curiam*) (emphasis added).

The Court's proper—indeed, necessary—role in this case is to protect the democratic process and citizens' trust. Because redistricting plans can restrict voting rights, any limitations on

this Court's role are unwarranted. See *Wesberry v Sanders*, 376 US 1, 6-7; 84 S Ct 526; 11 L Ed 2d 481 (1964) (refusing to support a construction of the Elections Clause, US Const, art I, § 4, cl 1, "that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts," noting that "[t]he right to vote is too important in our free society to be stripped of judicial protection"). Recognizing this judicial obligation, state courts have not hesitated to strike down redistricting plans which violate state constitutions. See generally, e.g., *Adams v Dewine*, ___ Ohio St 3d ___; 2022-Ohio-89; ___ NE3d ___; Nos 2021-1428 & 2021-1449, 2022 WL 129092 (January 14, 2022); *League of Women Voters of Ohio v Ohio Redistricting Comm*, ___ Ohio St 3d ___; 2022-Ohio-65; ___ NE3d ___; Nos 2021-1193, 2021-1198 & 2021-1210, 2022 WL 110261 (January 12, 2022); *Common Cause v Lewis*, No 18 CVS 014001, 2019 WL 4569584 (NC Superior Court, Wake Co, September 3, 2019), *appeal denied*, 373 NC 258; 834 SE2d 425 (2019) (*mem*); *League of Women Voters of Pa v Commonwealth*, 645 Pa 1; 178 A3d 737 (2018); *League of Women Voters of Fla v Detzner*, 172 So 3d 363 (Fla, 2015).

Further supporting this Court's pivotal role, the United States Supreme Court has repeatedly recognized the *primacy* of state courts in handling redistricting, ordering federal courts to defer to state courts. See, e.g., *Growe v Emison*, 507 US 25, 35; 113 S Ct 1075; 122 L Ed 2d 388 (1993). Chief Justice Roberts recently reinforced the primary role state courts must now play in resolving "complaints about districting" because federal courts have no jurisdiction over partisan bias claims:

> Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts. . . . Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.

Rucho v Common Cause, 588 US ___; 139 S Ct 2484, 2507; 204 L Ed 2d 931 (2019).

As Chief Justice McCormack has said:

> Ultimately, this Court has a duty to protect the state constitutional rights of Michiganders. The judiciary serves as a check on our coequal branches of government and ensures that their acts are constitutional. See *Marbury v Madison*, 5 U.S. (1 Cranch) 137, 178, 2 L. Ed. 60 (1803). I agree with Justice Harlan that "the judiciary has a particular responsibility to assure the vindication of constitutional interests," *Bivens*, 403 U.S. at 407, 91 S. Ct. 1999 (Harlan J., concurring in the judgment), and this responsibility is especially true of the state courts. See Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1401 (1953) ("In the scheme of the Constitutions, [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones."). When a fundamental constitutional right has been violated, it falls to the courts to determine what remedy is appropriate to vindicate it.

Mays v Governor of Mich, 506 Mich 157, 222; 954 NW2d 139 (2020) (McCormack, C.J., concurring).

Not only is this Court's analysis more thorough and searching in redistricting cases than in any other matter, but under § 6(19) the Court's analysis of the Adopted Plan is *not* limited to the criteria of § 6(13)—it includes *all* of "the requirements of this [state] constitution." Mich Const 1963, art 4, § 6(19).

> The supreme court, in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their respective duties, may review a challenge to any plan adopted by the commission, and shall remand a plan to the commission for further action *if the plan fails to comply with the requirements of this constitution*, the constitution of the United States or superseding federal law. In no event shall any body, except the independent citizens redistricting commission acting pursuant to this section, promulgate and adopt a redistricting plan or plans for this state.

Id. (emphasis added). 2018 Proposal 2 didn't alter or abrogate several provisions of the state constitution which apply to redistricting plans such as the state constitutional right to vote, *id.* art 2, § 4(1)(a); the protection, grounded in the rights of free speech and association, against

discrimination based on political viewpoint, see *id.* art 1, §§ 3, 5; and the purity of elections clause, *id.* art 2, § 4(2). The ICRC must comply with *all* of these state constitutional requirements because it is required to "comply with the requirements of this constitution" without exception. *Id.* art 4, § 6(19).

One searches in vain through the entire ICRC record for even an acknowledgment that it must comply with these state constitutional provisions, let alone any attempt to comply with them.

The Adopted Plan violated these state constitutional requirements, as well as § 6(13)(d).

III. THE ADOPTED PLAN VIOLATES ARTICLE 4, § 6(13)(D).

The Adopted Plan violates § 6(13)(d).

A. *The Standard of Analysis Under § 6(13)(d) is De Novo Without Deference to the ICRC.*

The standard of analysis under Article 4, § 6(13)(d) is *de novo*, and this Court owes no deference to the ICRC's "discretion," "good faith," or "judgment," however phrased. See, e.g., comments of Justice Viviano, Jan. 26, 2022 oral arg., *Detroit Caucus v. ICRC*, No 163926, at 54:50-55:08 (opining that ICRC conclusions due no more weight than any other litigant).

Determining the standard of analysis under § 6(13)(d) begins with the text of the Michigan Constitution:

> Districts shall not provide a disproportionate advantage to any political party. A disproportionate advantage to a political party shall be determined using accepted measures of partisan fairness.

Mich Const 1963, art 4, § 6(13)(d). As Justices Zahra and Viviano recently observed, "[w]ords matter; particularly words chosen for inclusion in the Michigan Constitution." *League of Women Voters v Secretary of State*, ___ Mich ___; ___ NW2d ___ (Nos 163711, 163712, 163744, 163745, 163747, and 163748), slip op at 14 (January 24, 2022) (Zahra, J, joined by Viviano, J, concurring in part and dissenting in part).

In the election context this Court has been clear: "shall" means "shall." That word is "a mandatory and imperative directive" which does not allow for "deficiencies" or "substantial compliance" but instead means "strictly comply." *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 601–02; 822 NW2d 159 (2012). The drafters of § 6(13)(d) are presumed to have been aware of this Court's strict interpretation of "shall" when they used it. See, e.g., *Hall v Ira Twp*, 348 Mich 402, 407; 83 NW2d 443 (1957) ("A constitutional provision must be presumed to have been framed and adopted in the light and understanding of prior and existing law and with reference to them."). The use of the word "shall" means that upon subsequent judicial analysis, the ICRC enjoys no "deference" to its "judgment," "good faith," or "discretion" in complying with § 6(13)(d).

The drafters could have followed the approach of the Colorado Constitution which expressly gives its redistricting commission flexibility in achieving its goals:

> Thereafter, the commission shall, *to the extent possible*, maximize the number of politically competitive districts.

Colo Const, art V, § 48.1(3)(a) (emphasis added); see also, e.g., Ariz Const, art IV, pt 2, § 1(14) (mandating that all state criteria be followed only "to the extent practicable"); Cal Const, art XXI, § 2(d) (showing many criteria as being subject to "as nearly as is practicable," "to the extent possible," and other qualifiers); Hawaii Const, art IV, § 6 (showing criteria as being subject to qualifiers such as "insofar as practicable," "where possible," and "where practicable"). But the drafters chose not to give the ICRC the flexibility available in these other states.

The strict compliance standard is reinforced by the text of § 6(19) governing this Court's analysis of whether the ICRC "compl[ied] with the requirements of this constitution:"

> The supreme court, in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their respective duties, may review a challenge to any plan adopted by the commission,

> and shall remand a plan to the commission for further action if the plan fails to comply with the requirements of this constitution, the constitution of the United States or superseding federal law. In no event shall any body, except the independent citizens redistricting commission acting pursuant to this section, promulgate and adopt a redistricting plan or plans for this state.

Mich Const 1963, art 4, § 6(19). Section 6(19) nowhere authorizes this Court to "defer" to the ICRC's "judgment," "good faith," or "discretion." The drafters of Proposal 2 knew how to require this Court to give the ICRC's compliance anything less than the highest level of scrutiny. For example, those drafters could have used deferential language like that found in Article 6, § 28 of the Michigan Constitution governing judicial review of administrative actions ("supported by . . . evidence on the whole record") but they did not. They could have taken language from previous Michigan constitutions creating discretion in redistricting, but they did not. See, e.g., *Stenson v Secretary of State*, 308 Mich 48, 55; 13 NW2d 202 (1944) (finding that the constitutional phrase "nearly as may be" gave legislature discretion in redistricting). Finally, the Colorado Constitution creates a deferential standard of judicial review of redistricting plans which the VNP drafters could have chosen but did not:

> The supreme court shall approve the plan submitted unless it finds that the commission or nonpartisan staff, in the case of a staff plan submitted in the absence of a commission-approved plan, *abused its discretion* in applying or failing to apply the criteria listed in section 44.3 of this article V, *in light of the record before the commission*.

Colo Const, art V, § 44.5(2) (emphasis added). This standard, akin to that applied to judicial review of an administrative agency's decision, is nowhere to be found in § 6(19). Given the ICRC's lack of factual findings, however, it would fail this standard even if it applied.

The drafters of the Proposal 2 took *none* of these textual paths to give the ICRC "discretion" or to require this Court to give "deference."

Nor can the ICRC take comfort in the fact that the partisanship criterion of § 6(13)(d) is

fourth on the list of criteria in which it "shall abide . . . in order of priority" to argue that it could give lesser weight to § 6(13)(d) or had more flexibility to comply with it. In the redistricting context, this Court long ago *rejected* a "rigid reading" of redistricting criteria in "stated order." *In re Appeal of Apportionment of Wayne Co*, 413 Mich 224, 259; 321 NW2d 615 (1982) (*per curiam*). The Michigan statute on county reapportionment states that county apportionment commissions are "governed by . . . guidelines in the stated order of importance." MCL 46.404. In the case of *In re Appeal of Apportionment of Wayne Co*, this Court held very clearly that simply because reapportionment criteria are listed in a particular order ***none* of them could be subordinated or ignored**. *See Wayne Co*, 413 Mich at 259. One of this Court's rationales is applicable here:

> We reject . . . a rigid reading of "stated order" because so read:
>
> • • •
>
> (c) It would give no effect whatsoever to [lower ranked] criteria . . . and thereby make meaningless those provisions. *It is our duty to read the statute as a whole and to avoid a construction which renders meaningless provisions that clearly were to have effect.*

Id. at 259–60 (emphasis added). The same is true for constitutional provisions which "must be interpreted . . . [so that] no provision should be construed to nullify or impair another." *Lapeer Co Clerk*, 469 Mich at 156. The ICRC cannot subordinate its duty to avoid "provid[ing] a disproportionate advantage to any political party" under § 6(13)(d) to accomplishing a higher-ranking criterion because that would impair, if not nullify, § 6(13)(d).

Next, not only does nothing in the text of §§ 6(13)(d) and 6(19) authorize judicial deference to the ICRC but the ICRC's very structure militates strongly against deference.

The ICRC is a temporary, once-a-decade entity. It is not an administrative agency which accumulates expertise in the law or facts to which a court could defer. Indeed, it is designed to *exclude* anyone from its membership who may have expertise or experience in redistricting.

Compare Mich Const 1963, art 4, § 6(b)(i)–(vii) (excluding political party leaders, consultants, and others from membership on the ICRC), with Colo Const, art V, §§ 44.1(8), 47(8)(a)(II) (requiring redistricting commissioners to be vetted and have "[r]elevant analytical skills"). It makes sense for a deferential standard of review to be applied to the Colorado commission's decisions because it is a body with some expertise. See Colo Const, art V, § 44.5(2). It makes no sense to defer to the ICRC, which has no expertise by design.

Moreover the objective standards applied to evaluate compliance with § 6(13)(d)—"disproportionate advantage to a political party shall be determined using accepted measures of partisan fairness"—are not the special province of the ICRC. Courts have readily and repeatedly applied them in original actions. See, e.g., *League of Women Voters of Pa*, 645 Pa at 50, 56, 96–97 (applying the efficiency gap and mean-median); *Benson*, 373 F Supp 3d at 895, 897, 901–03, 908 (applying the efficiency gap, mean-median, and declination). If other state and federal courts can apply these tests directly, so can this Court.

Additionally, even if this Court owed some type of deference to the Commission—which it does not—this Court has held that the legal views of an agency are entitled to nothing more than "respectful consideration." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008) (quoting *Boyer-Campbell Co v Fry*, 271 Mich 282, 296-97; 260 NW 165 (1935)). As to the 2020–21 iteration of the ICRC, its ineptness in handling partisan fairness from beginning to end detailed *supra* demonstrates that it is entitled to no deference whatsoever.

Finally, against all this the ICRC may claim that its plan is entitled to a "presumption of constitutionality." However, that presumption attaches to interpretation of legislative *statutes*, a proposition which is inapplicable here. *See, e.g., People v Carp*, 496 Mich 440, 460; 852 NW2d 801 (2014). This presumption doesn't attach to a redistricting *plan*, which is not a statute. Indeed,

this Court did not apply a "presumption of constitutionality" when it reviewed a legislatively-drafted congressional redistricting plan in *LeRoux v Secretary of State,* 465 Mich 594; 640 NW2d 849 (2002) (*per curiam*).

For all these reasons this Court's analysis of the ICRC's adherence to § 6(13)(d) is *de novo*, the Court owes no deference to the ICRC whatsoever, and the ICRC has no discretion in its adherence to § 6(13)(d).

B. *The Adopted Plan Provides a Disproportionate Advantage to the Republican Party in Violation of § 6(13)(d).*

Before applying the evidence, we first analyze the meaning of § 6(13)(d).

1. *Section 6(13)(d) Does Not Require Intent.*

The text of § 6(13)(d) contains no intent requirement, only objective words and standards creating an "effects" or "results" test:

> Districts shall not provide a disproportionate advantage to any political party. A disproportionate advantage to a political party shall be determined using accepted measures of partisan fairness.

"Provide" and "advantage" are terms reflecting an effect or result. All of the "accepted measures of partisan fairness"—efficiency gap, mean-median, etc.—are objective, containing no "intent" requirement. Using those measure to assess partisan fairness excludes a requirement that intent is required. Confirming that § 6(13)(d) does not require intent is a comparison to other state constitutions which impose an intent requirement. See, e.g., Fla Const, art 3, § 20(a) (prohibiting the legislature from enacting a plan or district "with the intent to favor or disfavor a political party or an incumbent").

Section 6(13)(d) does not require intent—therefore, a plan resulting in or having the effect of creating a "disproportionate advantage" violates § 6(13)(d).

2. *The Meaning Of "Disproportionate Advantage."*

This is a new term in Michigan redistricting statutes and the constitution.

The ICRC will erect a straw man argument to claim that § 6(13)(d) does not require proportional representation of political parties. Whether true or not,[11] that does not mean that *dis*proportionate redistricting is allowed—§ 6(13)(d) expressly forbids a "disproportionate advantage" to a political party. Moreover, the concept of proportionality is embedded in the phrase "dis*proportionate* advantage" so consideration of what is "proportionate" is unavoidable. In other words, the Court cannot determine what is "disproportionate" until it determines what is "proportionate."

The "accepted measures of partisan fairness" whose use is mandated by the second sentence of § 6(13)(d) inform the Court what is "proportionate" and "disproportionate" without requiring proportional representation. This is so because those measures evaluate *partisan symmetry*, which is different from *proportional representation*.

For example, proportional representation would require that a political party which gets 55% of the vote win 55% of the districts.[12] However under a system of partisan symmetry the goal is *equal treatment* of the political parties, not proportional outcomes. Thus, if a political party took 55% of the districts when it won 51% of the vote, partisan symmetry requires that the other political party win 55% of the districts if it receives 51% of the vote. While those results are not proportional—each party received more seats than votes—they are symmetrical: the same *voting performance* by the political parties yields the same *number* of seats for both. Thus, neither political party has a "disproportionate advantage" over the other in violation of § 6(13)(d).

[11] The United States Supreme Court has recognized that a state can create a redistricting plan which uses proportional representation. See *Gaffney v Cummings*, 412 US 735, 754; 93 S Ct 2321; 37 L Ed 2d 298 (1973).

[12] The Ohio constitutional provisions on legislative apportionment create a system of proportional representation. See Ohio Const, art XI, § 6(B).

Moreover, because the House is controlled by a majority, it is of no comfort to a political party or its voters that it consistently wins 54 seats in the House when it wins a majority of the votes. Put another way, are the parties treated symmetrically in their efforts to win a *majority* of the seats? Does a majority of the vote yield a majority of the seats for *both* parties? A fair redistricting plan treats both parties symmetrically as they pursue a majority of seats; an unfair plan treats them asymmetrically.

Several accepted measures of partisan fairness can be used to determine if one party has an asymmetrical advantage in the electoral process. Where a party has an asymmetrical advantage, that proves that a plan "disproportionately advantages" that party.

The Efficiency Gap. The efficiency gap measures the degree to which a party "wastes" votes, i.e., receives votes which do not result in winning a district. Wasted votes consist of all the votes won by the losing party in a district, and all of the votes over 50% + 1 received by the winning party. Of course, all parties waste some votes. But where one party wastes far more than another, it indicates an asymmetrical advantage.

The Mean-Median Gap. The mean-median gap measures the difference between a party's vote share in the median district and its average vote share across all districts. Comparing a dataset's mean and median is common statistical analysis used by political scientists to assess skews in the data and detect asymmetries. In the context of partisan gerrymandering, if a party wins more votes in the median district than in the average district, it has a disproportionate advantage in its translation of votes to seats.

Declination. This measure looks at asymmetry in vote distribution as an indicator of the level of partisan bias. If all the districts in a plan are lined up from most Democratic to least Democratic, the mid-point of the line formed by one party's seats should be as far from the 50

percent threshold for victory on average as the other party's. Declination takes the difference between the two angles of the lines between the mean across all districts and the point on the 50 percent between the mass of points representing each party, and then divides by $\pi/2$ to convert the result from radians to fractions of 90 degrees. This produces a number between -1 and 1, where negative numbers favor Republicans and positive ones favor Democrats.

The Vote-Seat Curve. The vote-seat curve seeks to measure whether two opposing parties are equally likely to command the same number of seats given a certain share of votes. Thus, if one party has a disproportionate number of seats given its vote share, in an unbiased system the opposing party would have the same (disproportionate) advantage if it were to have that same vote share. For example, if one party receives a vote share of 57% and a seat share of 64%, then in an unbiased system the opposing party would also win 64% of the seats if it were to attain 57% of the votes.

Handley's own analysis using four (4) measures of partisan fairness establishes that the Adopted Plan provides a disproportionate advantage to the Republican Party because all of her measures favor the Republican Party. Plaintiffs have also submitted an expert report with their complaint by Dr. Christopher Warshaw which confirms that unfairness and its pernicious partisan effects. See Warshaw Report January 28, 2022 ["Warshaw Report"], Ex. 1.

Plaintiffs' expert, Christopher Warshaw, has a Ph.D. in political science and a J.D., both from Stanford University. Warshaw Report at 1. Currently he is an associate professor at George Washington University whose academic research focuses on public opinion, representation, elections, and polarization in American politics. *Id.* Dr. Warshaw's more than 20 scholarly articles include two on redistricting. *Id.* He also has an upcoming book on the causes and consequences of gerrymandering in state governments. *Id.* He has authored expert reports in multiple redistricting

and gerrymandering cases, and performed partisan fairness analyses in those cases, including in Michigan in *League of Women Voters*, *supra*, 373 F Supp 3d 867 (ED Mich, 2019). *Id.* at 3. Dr. Warshaw is also on the social science advisory team for PlanScore, a statistical model website from the non-partisan Campaign Legal Center, which allows citizens to score maps for partisan, demographic, racial, and geographic features. *Id.* at 2, 4.

In this matter, Dr. Warshaw used three complementary methodologies to evaluate the partisan fairness of the Adopted Plan. Warshaw Report at 3-4. ***First***, he used a composite of previous statewide election results from 2012 to 2020 in analyzing the Adopted Plan's state House map. *Id.* at 3. ***Second***, he analyzed results of state House election data from 2012 to 2020 on the new map. *Id.* at 3-4. ***Third***, Dr. Warshaw used the statistical model in PlanSource (which estimates district-level vote shares for a new map based on the relationship between presidential election and legislative results) as an additional data point to analyze the new map. *Id.* at 4.

To measure the partisanship of the Adopted Plan, Dr. Warshaw used four measures of partisan fairness widely accepted by academic literature in the field which focus on measurement of asymmetry in the vote-seat relationships of the two major political parties. Warshaw Report at 6. These measures were the Efficiency Gap, Mean-Median Difference, Vote-Seat Curve Symmetry, and Declination. *Id.* at 6-10. When he applied these four methods of measuring partisan fairness in the first methodology – the composite of previous statewide election results 2012-2020 – Democrats won 52% of votes but only 50% of seats overall. *Id.* at 11. As an initial matter, this points toward a disproportionate advantage favoring Republicans across all four measures. *Id.* at 11-13.

When Dr. Warshaw looked at the second methodology, composite state House results from the last decade, the same result occurs: pro-Republican bias across all four measures, ending in a

prediction that Democrats win 52% of State House votes but only 49% of House seats. Warshaw Report at 13-14.

Finally, Dr. Warshaw's use of the PlanScore statistical model also came to the same result, i.e., that Republicans enjoy disproportionate advantage, predicting that Democrats would win 51% of the State House votes in the next decade, but only end up with only 48% of the legislative seats in that chamber. Warshaw Report at 14-15.

In all four methods of measuring partisan fairness, the Republican Party's opportunity to control the State House is out of proportion – disproportionate – to that of the Democratic Party, since all four predict that Democrats will win a larger share of votes but continue to be relegated to the status of minority party in the State House. Put another way, Republicans have a disproportionate advantage since they can control the State House with a minority vote share while Democrats may not win the House even when they win a majority of the votes. Even a few percentage points of advantage, like Dr. Warshaw predicts under all three methodologies, is significant in a state like Michigan with narrow margins of victory occurring in State House races and control of the State House often turning on one or two seats. Accordingly, Dr. Warshaw concludes that there is disproportionate advantage in the Adopted Plan to the Republican Party in violation of the Michigan Constitution. Warshaw Report at 17. This advantage is not transient and will be persistent for the next decade. See, e.g., Grofman & King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after LULAC v. Perry,* 6 Election Law Journal 2, 25 (2007) ("a partisan bias of 1-3 percentage points . . . is typically persistent over the decade following the redistricting.").

Dr. Warshaw is one of the foremost national experts on partisan fairness, with extensive overall experience on this topic, significant scholarship, rigorous considerations of the appropriate

methodologies, and subsequent analysis as applied here to the Adopted Plan for the State House. Moreover, given the past reliance on his similar work by other courts who found his opinion testimony to be credible and admissible, e.g., Warshaw Report at 3, this Court should also admit his expert report as evidence of the disproportionate partisan advantage inherent in the Adopted Plan. See MRE 704-05. Indeed, the Michigan Constitution in § 6(13)(d) specifically requires on its face the use, and therefore the admissibility, of such measures.

Accordingly, Plaintiffs have demonstrated by admissible expert evidence that the Adopted Plan provides a "disproportionate advantage" to the Republican Party in violation of § 6(13)(d). Warshaw Report at 17.

IV. THE ADOPTED PLAN VIOLATES THE FUNDAMENTAL RIGHT TO VOTE BY DILUTING DEMOCRATIC VOTES.

A. *Strict Scrutiny of the Adopted Plan is Required.*

This Court has long recognized that the right to vote is a fundamental constitutional right:

> The right to vote has always received a preferred place in our constitutional system. The importance of this right can hardly be overemphasized. It is the basic protection that we have in insuring that our government will truly be representative of all of its citizens. The United States Supreme Court has held in numerous recent decisions involving the right to vote that in order that a State law prevail which impedes this fundamental constitutional right, there must be demonstrated a compelling state interest.

Mich State UAW Community Action Program v Austin, 387 Mich 506, 514; 198 NW2d 385 (1972) (footnote omitted). Intent to violate the right to vote is not required—the sole issue is whether the right is in fact burdened. See *id*. at 516. The holding in *UAW* has been reinforced by the addition of an express right to vote a secret ballot to the text of the Michigan Constitution in 2018. See Mich Const 1963, art 2, § 4(1)(a). Burdens on a fundamental right such as the right to vote are subject to strict scrutiny under which that burden must be justified by a compelling state interest

advanced in a narrowly tailored way. See, e.g., *Phillips v Mirac, Inc*, 470 Mich 415, 432-33; 685 NW2d 174 (2004).

As the United States Supreme Court has held in the redistricting context, the right to vote is "a fundamental political right" that is "preservative of all rights." *Reynolds v Sims*, 377 US 533, 562; 84 S Ct 1362; 12 L Ed 2d 506 (1964) (quoting *Yick Wo v Hopkins*, 118 US 356, 370; 6 S Ct 1064; 30 L Ed 220 (1886)). Explaining the significance of the right to representation through voting, the Court in *Reynolds* elaborated:

> [R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and *every citizen has an inalienable right to full and effective participation in th[is] political process[]* . . . . Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens . . . requires, therefore, that each citizen have an equally effective voice in the election of [a representative].

Id. at 565 (emphasis added).

This fundamental constitutional right to vote may not be burdened by the dilution of the vote of *any* citizen. See, e.g., *id.* at 555; *Purcell v Gonzalez*, 549 US 1, 4; 127 S Ct 5; 166 L Ed 2d 1 (2006) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.") (quoting *Reynolds*, 377 US at 555); *Bush v Gore*, 531 US 98, 104-05; 121 S Ct 525; 148 L Ed 2d 388 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."); *Dunn v Blumstein*, 405 US 330, 336; 92 S Ct 995; 31 L Ed 2d 274 (1972) ("[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.").

A redistricting plan can harm voters by diluting their individual voting strength in violation

of these principles. The United State Supreme Court in *Gill v Whitford*, 585 US ___; 138 S Ct 1916; 201 L Ed 2d 313 (2018), confirmed that individual voters who have had their individual voting strength diluted by a redistricting plan had standing to mount a challenge to that plan under the Fourteenth Amendment. See *id.* at 1929. Writing for the majority, Chief Justice Roberts reaffirmed that an individual voter suffers a cognizable, redressable injury from partisan vote dilution:

> We have long recognized that a person's right to vote is "individual and personal in nature." Thus, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue" to remedy that disadvantage.

Id. (citations omitted).

In *Gill*, the Supreme Court held that a voter may establish injury in fact by showing that she lives in a "cracked" or "packed" district whose boundaries have placed a "burden on [her] individual vote[.]" 138 S Ct at 1931–32, 1934. Chief Justice Roberts explained that "harm arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district." *Id.* at 1931.

The Supreme Court reiterated that a redistricting plan harms individual voters by diluting their votes in *Rucho*, 139 S Ct at 2492. Although the Court held that federal courts had no jurisdiction over partisan gerrymandering claims, it restated the harm to the individual right to vote caused by dilution of their vote. See *id.* at 2492, 2506-07; see also *id.* at 2514 (KAGAN, J., dissenting) (writing that voter equality "can be denied by a debasement or dilution of the weight of a citizen's vote") (quoting *Reynolds*, 377 US at 555).[13]

[13] For decades, this Court also has recognized the serious problem of partisan gerrymandering and attempted to address it when it could. See, e.g., *State Legislature*, 413 Mich at 134 (requiring compactness in Court-created legislative

Because *every individual voter's* right to vote is a fundamental constitutional right equal to every other voter's, the State Constitution's right to vote mandates a goal of no vote dilution of any voter's vote during redistricting. Thus there is no *de minimis*, tolerable, or acceptable level of vote dilution in a redistricting plan. When the fundamental right to vote is burdened by vote dilution in a redistricting plan, strict scrutiny is required. See, e.g., *Mich State UAW*, 387 Mich at 514; *Mirac*, 470 Mich at 432. Strict scrutiny of redistricting plans ensures compliance with the constitutional mandate that no voter suffer vote dilution.

As demonstrated next, the ICRC's Adopted Plan dilutes the votes of Democratic voters and cannot be justified by a compelling government interest advanced in a narrowly tailored way. The Adopted Plan fails strict scrutiny and violates the fundamental right to vote.

B. *The Adopted Plan Fails Strict Scrutiny*

The ICRC's own analysis establishes that the Adopted Plan dilutes Democratic votes. The expert analysis of Dr. Warshaw confirms that dilution.

1. *Expert Evidence Establishes That Democratic Votes Are Diluted.*

The partisan fairness examined in all four methods of measuring by Dr. Warshaw is a means of determining the extent of vote dilution, i.e., the extent to which some voters' votes count more or less than others. Warshaw Report 3-5. Dr. Warshaw determined that the Republican Party's opportunity to control the State House is disproportionate to that of the Democratic Party, since all predict that Democrats will win a larger share of votes but continue to be the minority party in the State House, thus diluting the value of votes for Democratic State House candidates.

redistricting criteria to help curb gerrymandering); *In re Apportionment of State Legislature*, 437 Mich 1208, 1212; 463 NW2d 713 (1990) (LEVIN, J., concurring) (*mem*); *In re Apportionment of Mich Legislature*, 377 Mich 396, 445–46; 140 NW2d 436 (1966) (SOURIS, J., dissenting) (explaining that he would consider a well-pled state constitutional gerrymandering claim). This constitutional case represents this Court's best opportunity in 60 years to mandate partisan fairness in redistricting.

Conversely the value of votes for Republican candidates for the State House is enhanced since Republicans can control the State House with only a minority of the vote. Dr. Warshaw's conclusion that there is disproportionate advantage in the Adopted Plan to the Republican Party in violation of 6(13)(d) also demonstrates that unconstitutional vote dilution will occur under the Adopted Plan. Cf. Warshaw Report at 17.

2. *The Vote Dilution Serves No Compelling State Interest*.

The Adopted Plan's vote dilution serves no compelling state interest. Even assuming that all the other criteria in § 6(13) serve compelling interests, as demonstrated by PTV's State House plan, *all* of those redistricting criteria can be met as well or better without the vote dilution of the Adopted Plan. Thus the vote dilution of the Adopted Plan serves no compelling state interest.

3. The Plan Is Not Narrowly Tailored.

A plan which minimized vote dilution as much as possible including to zero would meet the narrow tailoring requirement. The Adopted Plan does not meet this criterion because the PTV plan minimizes vote dilution much better than the Adopted Plan.

V. THE ADOPTED PLAN DISCRIMINATES BASED ON POLITICAL AFFILIATION.

The fundamental rights of free speech, association, and to petition under Michigan Constitution Article 1, §§ 3 and 5 are coextensive with those under the First Amendment to the U.S. Constitution. *Woodland v Mich Citizens Lobby*, 423 Mich 188, 207-08; 378 NW2d 337 (1985) ("'[T]he same liberty of speech . . . is secured by the Constitution of the State of Michigan' as is guaranteed by the First Amendment.") (quoting *Book Tower Garage, Inc v Local No 415 Int'l Union, UAW*, 295 Mich 580, 587; 295 NW 320 (1940)). Infringements on these fundamental rights are reviewed under a strict scrutiny analysis. See, e.g., *Vargo v Sauer*, 457 Mich 49, 60; 576 NW2d 656 (1998).

"[P]olitical belief and association constitute the core of those activities protected by the First Amendment." *Elrod v Burns*, 427 US 347, 356; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (plurality opinion). The freedom of association "includes partisan political organizations." *Tashjian v Republican Party of Conn*, 479 US 208, 214; 107 S Ct 544; 93 L Ed 2d 514 (1986). Consequently, "the right of qualified voters, *regardless of their political persuasion*, to cast their votes effectively . . . rank[s] among our most precious freedoms." *Anderson v Celebrezze*, 460 US 780, 787; 103 S Ct 1564; 75 L Ed 2d 547 (1983) (emphasis added) (quoting *Williams v Rhodes*, 393 US 23, 30; 89 S Ct 5; 21 L Ed 2d 24 (1968)).

Because in Michigan elections, "voters can assert their preferences only through candidates or parties or both," *id.*, vote dilution based on political affiliation in redistricting not only violates the fundamental right to vote, it infringes on the right to cast an effective vote regardless of political persuasion, a right protected by Article 1, §§ 3 and 5 of the Michigan Constitution. Compare, e.g., *Lewis*, 2019 WL 4569584, at *123 (finding that the legislature's gerrymandered plans intentionally "adversely affect[s] the . . . associational rights" of Democrats under the state constitution), with *Anderson*, 460 US at 787.

Intent is not required to prove a violation of Article 1, §§ 3 and 5. However, even if intent was required, in the redistricting context "if partisanship can be demographically and cartographically established, it is usually considered intentional." *Gaffney*, 412 US at 749–51.

For these additional reasons strict scrutiny must be applied to the Adopted Plan due to its burden on the associational rights of Democratic voters. Those burdens must be justified by a compelling government interest satisfied in a narrowly tailored way. The Adopted Plan fails this standard as detailed *supra* in Section IV.

VI. THE ADOPTED PLAN VIOLATES THE PURITY OF ELECTIONS CLAUSE.

The purity of elections clause in Article 2, § 4(2) of the Michigan Constitution demands "fairness and evenhandedness in the election laws of this state." *Socialist Workers Party v Secretary of State*, 412 Mich 571, 598; 317 NW2d 1 (1982). It requires that "every elector's franchise [be] of equal value to every other elector," such "that every elector has an equal voice in the choice of those who shall represent the people." *Maynard v Bd of Dist Canvassers*, 84 Mich 228, 240-42; 47 NW 756 (1890).

In *Maynard*, this Court struck down a state law allowing cumulative voting, which is voting for more than one State Representative candidate, because of a voter's state constitutional right to have her vote "be of as much influence or weight in the result . . . as the ballot and vote of any other elector." 84 Mich at 241, 243. The Legislature did not have that authority under its power to "purify" elections. *Id.* at 238-39. Under *Maynard,* this Court was an early guardian against the dilution of a voter's vote. That principle applies here where the Adopted Plan causes Democratic votes for State Representative to be worth less and Republican votes for State Representative to be worth more.

For the reasons set forth in Section IV *supra* the Adopted Plan's vote dilution violates the purity of elections clause as well as the fundamental right to vote.

VII. THE COURT SHOULD VACATE THE ICRC'S STATE HOUSE PLAN, AND REMAND TO THE COMMISSION TO ADOPT A PLAN WITH PARTISAN FAIRNESS AT LEAST MATCHING THE PTV PLAN, INCLUDING AUTHORIZING THE ICRC TO ADOPT PTV'S STATE HOUSE PLAN.

With the April 19, 2022 filing deadline approaching, there is little time for the Court to remand to the ICRC for it to fix its fatally flawed State House plan. The House plan of Promote the Vote (PTV) better complies with *all* the constitutional criteria than the ICRC's State House plan. The Court should use its broad remedial authority under Article 4, § 6(19) to remand this

matter to the ICRC, and order it to promptly adopt a plan as fair or fairer than the PTV plan, including the option of adopting the PTV plan.

A. *Article 4, § 6(19) Grants This Court Broad Remedial Authority.*

The enforcement provision of Article 4, § 6(19) vests original jurisdiction in this Court to enforce the ICRC's duties, review its plans, and remand for further action in proceedings which sound in mandamus:

> The supreme court, in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their respective duties, may review a challenge to any plan adopted by the commission, and *shall remand a plan to the commission for further action if the plan fails to comply with the requirements of this constitution*, the constitution of the United States or superseding federal law. In no event shall any body, except the independent citizens redistricting commission acting pursuant to this section, promulgate and adopt a redistricting plan or plans for this state.

Mich Const 1963, art 4, § 6(19) (emphasis added).

As the Court determined in *Citizens Protecting Michigan's Constitution v Secretary of State*, the ICRC is "materially similar" to the reapportionment commission created by the 1963 Constitution. *Citizens Protecting Mich's Constitution*, 503 Mich at 55. Indeed, the enforcement provision regarding the ICRC is almost identical to the 1963 enforcement provision:

> Upon the application of any elector filed not later than 60 days after final publication of the plan, the supreme court, in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their duties, may review any final plan adopted by the commission, and shall remand such plan to the commission for further action if it fails to comply with the requirements of this constitution.

Mich Const 1963, art 4, § 6, ¶8 (as adopted). This Court's analysis in *Citizens Protecting Michigan's Constitution*, found that this Court "would maintain the same general powers it wielded under the 1963 Constitution as ratified." *Citizens Protecting Mich's Constitution*, 503 Mich at 99.

The drafters of the 2018 constitutional amendment are presumed to be aware of the history and interpretation of the provision they took from the 1963 Constitution, and to have intended the same for their work. See, e.g., *Hall*, 348 Mich at 407. Therefore, to ascertain the scope of this Court's power under Article 4, § 6(19) it is necessary to examine the history and interpretation of its 1963 doppelganger, Article 4, § 6 ¶8, as well as scope of the mandamus remedy generally. That examination reveals that Article 4, § 6(19) vests this Court with original jurisdiction to provide broad relief in redistricting cases.

In order to determine the meaning of Article 4, § 6(19) and the meaning of Article 4, § 6, ¶8 of the original 1963 Constitution, we start with this Court's role in redistricting prior to the 1961–62 Constitutional Convention.

Since at least the Constitution of 1850 this Court has had original jurisdiction to issue prerogative and remedial writs, including mandamus, quo warranto, procedendo, error, habeas corpus and others. See Mich Const 1850, art 6, § 3; Mich Const 1908, art 7, § 4; Mich Const 1963, art 6, § 4; 1961–62 Constitutional Convention Record at 3385 (address to the People regarding Article 6, § 4).

Unlike the United States Supreme Court in *Colegrove v Green*, 328 US 549, 552; 66 S Ct 1198; 90 L Ed 1432 (1946) (plurality opinion) (districting non-justiciable under federal constitution), this Court has never held that legislative districting was non-justiciable. Instead, this Court decided several original actions under the 1850 and 1908 Constitutions seeking mandamus relief in legislative districting. See generally, e.g., *Scholle v Hare*, 360 Mich 1; 104 NW2d 63 (1960), *judgment vacated*, 369 US 429 (1962) (*per curiam*), *on remand*, 367 Mich 176; 116 NW2d 350 (1962), *cert denied sub nom Beadle v Scholle*, 377 US 990; 84 S Ct 1901; 12 L Ed 2d 1043 (1964); *Stenson*, 308 Mich 48; *Stevens v Martindale*, 181 Mich 199; 148 NW 97 (1914); *Williams*

v Secretary of State, 145 Mich 447; 108 NW 749 (1906); *Giddings v Blacker*, 93 Mich 1; 52 NW 944 (1892); *Bd of Supervisors v Blacker*, 92 Mich 638; 52 NW 951 (1892).

In all of these cases, this Court resolved legal conflicts between the state constitution and districting plans adopted by the Legislature, or in the case of *Scholle,* between a state constitutional amendment and the federal constitution. Prior to *Scholle*, based on separation of powers concerns, this Court never ordered the Legislature to redistrict itself as a remedy in these mandamus proceedings, instead employing more limited remedies. See, e.g., *Williams*, 145 Mich at 454; *Giddings*, 93 Mich at 9; 1961–62 Constitutional Convention Record at 2014 (remarks of Delegate Hannah) ("When legislatures fail to reapportion there are no means to force action since the judiciary, under the separation of powers doctrine, has traditionally refused to mandamus legislatures.").[14]

Thus, the state of the law as the 1961–62 Constitutional Convention began was that this Court had long exercised original jurisdiction in mandamus to resolve legislative redistricting conflicts between statutes and the state constitution and conflicts between state and federal constitutions, but it had refrained prior to *Scholle* from using mandamus against the Legislature to order redistricting.

The 1963 Constitution made a significant change in redistricting, moving it from the Legislature and Governor to a new bipartisan Commission on Legislative Apportionment ("CLA"). See Mich Const 1963, art 4, § 6 (as adopted).

This change was intended to have several beneficial effects, including expanding this Court's authority over redistricting because separation of powers concerns did not preclude it from

[14] This Court went further in its remedy in *Scholle* than it had previously in an order issued after Delegate Hannah spoke. This Court gave the Legislature a deadline to redistrict the State Senate, failing which the Court would act. See *Scholle*, 367 Mich at 192.

directing the CLA in the performance of its duties. See 1961–62 Constitutional Convention Record at 2015 (remarks of Delegate Hannah, the Chair of the Committee on Legislative Organization) ("Failure of the commission to act or not to act in accordance with the principles established in the constitution can be remedied by action of the supreme court.").

Building on this Court's exercise of original jurisdiction in mandamus actions under the 1850 and 1908 Constitution cited *supra*, the Convention's judicial remedies proposal granted this Court original jurisdiction to exercise broad mandamus-type authority over the CLA in the performance of its duties:

> Upon the application of any qualified elector, the Supreme Court, in the exercise of original and final jurisdiction, shall direct the Secretary of State or the apportionment commission to perform their duties, or may review any final districting plan adopted by the apportionment commission and shall make orders to amend such plan if it fails to comply with the requirements of this Constitution: provided, that no such application shall be filed more than 60 days after the final publication.

Id. at 2014. After further debate and amendment, the final version was adopted by the Convention and the voters who ratified the 1963 Constitution, which took effect January 1, 1964:

> Upon the application of any elector filed not later than 60 days after final publication of the plan, the supreme court, in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their duties, may review any final plan adopted by the commission, and shall remand such plan to the commission for further action if it fails to comply with the requirements of this constitution.

Mich Const 1963, art 4, § 6, ¶8 (as adopted).[15]

The delegates to the Convention who drafted Article 4, § 6, ¶8 were aware of this Court's historical use of mandamus in redistricting matters to resolve legal disputes. See, e.g., 1961–62 Constitutional Convention Record at 2014 (remarks of Delegate Hannah). Far from repudiating or

[15] Because the CLA had eight members divided between the political parties, this Court also became the tiebreaking mechanism under former Article 4, § 6, ¶7. The Court's tiebreaking role is not relevant to issues in the Complaint.

narrowing this Court's historical authority, the delegates created the CLA so this Court could exercise *expanded* mandamus authority over the CLA without separation of powers concerns.[16]

Thus, when the authors of the 2018 Proposal 2 copied former Article 4, § 6, ¶8 and when the voters adopted it, this Court's original jurisdiction over extensive mandamus remedies as to the CLA was revived in Article 4, § 6(19) as to the new ICRC.

B. *The Court Has the Authority To Allow The ICRC To Adopt PTV's State House Plan.*

While only the ICRC can "promulgate and adopt" a redistricting plan, as set forth above this Court's remedial authority is extensive — it can "remand a plan to the commission for further action if the plan fails to comply with the requirements of this constitution." Mich Const 1963, art 4, § 6(19). "Further action" is broad and can include allowing the ICRC to adopt a specific plan such as PTV's State House plan which meets all the criteria. The Court's authorization is necessary here because the ICRC apparently but incorrectly believes that it cannot use or adopt any plan its hasn't literally drafted itself.

C. *PTV's State House Plan Complies With All The Constitutional Requirements As Well Or Better Than The ICRC Adopted Plan.*

The PTV Plan demonstrates that it is possible to comply with *all* the constitutional criteria and produce a much fairer plan than the Adopted Plan. Those criteria are not in conflict and partisan fairness need not be subordinated in order to meet the other criteria.

The PTV Plan is contiguous and the population range of its districts falls within the range set by the United States Supreme Court, see, e.g., *Voinovich v Quilter,* 507 U.S. 146 (1993). It

[16] In the brief time Article 4, § 6, ¶8 was in effect, 1964–1982, it was only used once to invoke this Court's jurisdiction to review an adopted plan. See *In re Apportionment of Mich Legislature*, 376 Mich 410, 420; 137 NW2d 495 (1965). This Court construed its authority broadly, allowing discovery and setting a deadline for the CLA to conclude its work on remand. See *id.* at 438-40. This Court ultimately dismissed the challenge. *Mich Legislature*, 377 Mich at 474.

"reflects the state's diverse population and communities of interest,[17] see https://www.michigan-mapping.org/submission/o6250, and complies with the Voting Rights Act. It "reflects consideration of . . . boundaries" and is as compact if not more so than the Adopted Plan, see Warshaw Report at 16-17. And it is much fairer from a partisan perspective than the Adopted Plan. See generally *id.*

The Court should authorize the ICRC on remand to adopt the PTV plan as a remedy to the Adopted Plan's fatal constitutional flaw on partisan fairness.

CONCLUSION AND RELIEF SOUGHT

For all these reasons Plaintiffs pray that the Court:

A. Vacate the ICRC's December 28, 2021 adoption of a redistricting plan for the State House of Representatives;

B. Remand the matter of a State House plan to ICRC;

C. Require the ICRC to promptly adopt a State House plan whose partisan fairness metrics match or improve on the metrics of the PTV State House Plan;

[17] Throughout the ICRC's process in creating the new maps, including the Adopted Plan, the ICRC took extensive testimony on "communities of interest," one of the other criteria for consideration under the Michigan Constitution. Like the partisan fairness criteria barring a disproportionate advantage to a political party, the ICRC did not define at the beginning – or ever – any working definition for "communities of interest," nor any systematic way of measuring them. Unlike partisan fairness, however, the ICRC considered a variety of alleged communities of interest as it drew the maps, just as it considered data and measurements on many of the other criteria while they put together the critical first drafts. Partisan fairness stood almost alone throughout the first round of mapping as the criteria on that General Counsel Pastula would not permit them to consider as they worked, with the possible exception of VRA data – which had not been completed or presented at the time the ICRC began mapping. This was a critical difference between the treatment of most of the criteria contrasted with the treatment of partisan fairness data, and the subject of a lot of critical public comment and individual Commissioner concern, as discussed *supra*.

However, one of the other many concerning facts about the consideration of alleged communities of interest throughout the process – juxtaposed with the intentional withholding of partisan fairness data in the initial drafts – is that the lack of an attempt at defining "communities of interest" led to a great deal of public comment which urged the ICRC to consider prohibited factors like incumbent politicians or – in some cases, thinly-veiled racist tropes – under the guise of calling such preferences "communities of interest." There was no systemic examination of whether a claimed community of interest really was such for purposes of the Constitution's plain language, no way of determining resolution when communities of interest might conflict with one another for map-drawing purposes, and no method for determining if there was sufficient evidence of existence of a claimed community.

D. Authorize the ICRC to adopt the PTV State House Plan as its plan.

Respectfully submitted,

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